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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

CIVIL AERONAUTICS BOARD, *Petitioner,* v. STATE AIRLINES, INC., *Respondent.*	No. 157
STATE AIRLINES, INC., *Cross-Petitioner,* v. CIVIL AERONAUTICS BOARD and PIEDMONT AVIATION, INC., *Cross-Respondents.*	No. 158

REPLY OF STATE AIRLINES, INC. TO SUPPLEMENTAL MEMORANDUM FILED BY CIVIL AERONAUTICS BOARD.

This reply is necessary because the Board's memorandum goes far beyond furnishing factual information. It makes arguments some of which are both new and unfounded.

The entire memorandum is directed only to the due process point. Undoubtedly this point is important. It did, however, not enter into the decision below and is stressed here by State

only as an additional reason for holding that the certification of Piedmont was not authorized by the statute. Even if it be assumed, though this is not the fact, that the Board had announced its intent to certificate Piedmont without regard to Piedmont's own application, such certification would nevertheless have violated the plain limitation of the statute confining the Board's power to certificating "the whole or any part of the transportation covered by the application" (Civil Aeronautics Act, § 401[d]; see State's Rep. Br., p. 13).

The fundamental issue of notice to which this Court addressed some questions during the argument was whether or not State and others had notice of the Board's intent to certificate to Piedmont routes entirely uncovered by Piedmont's application. That there was no notice of such intent is a specific fact. The Board's attempted answer, however, merely forsakes the ugly fact for the glitter of beautiful generalities.

(a) Reply to paragraphs numbered 1, 2 and 3.

The facts stated in these paragraphs are accurate. They deal entirely with notice to be given of "each application". Such notice was given. It notified all interested parties of Piedmont's application. It was notice that Piedmont was not a candidate for the routes certificated.

(b) Reply to paragraph numbered 4.

The use of the matter set out in this paragraph in the present case is inexcusable. The Board's regulation, which the Board now tenders to this Court as evidence of notice to State as to issues to be taken up at hearings in the case here involved, was promulgated to be effective on *September 11, 1946*. The issues to be disposed of were discussed at the prehearing conference on *January 22, 1945* (Tr. 733). The hearings in this case were

held in the *summer of 1945* (see, *e.g.*, R. 416). The hearings were closed more than a year *before* the regulation, now made the cornerstone of the Board's argument, was even thought of by the Board and the examiners' report was filed several months before September 11, 1946* (R. 525).

Whereas the Board seeks to leave the impression by its underscoring that a consolidation order sets general geographic limits for a proceeding, the fact is otherwise. All that a consolidation order has ever done, and all that was done in this case, is to consolidate actual applications or parts thereof for hearing (R. 27; Tr. 707, *et seq.*). Nowhere in this record, or in any other Board record dealing with domestic applications under Section 401(d) of the Act, has the Board set for hearing any general question of certification within a given area. The order of consolidation has never done more than to order a common hearing for specific applications. The geographical limits result from the points specified in the applications consolidated and not from any issue specified in the order of consolidation. The "scope" of the hearings is thus established by the applications to be considered and by nothing else. Those are the plain unvarnished facts.

(c) Reply to paragraphs numbered 5 and 6.

The facts here stated are accurate but have no bearing on the issue of due process. It is not contended and cannot be contended that anything in either the prehearing conference notice or the report of that conference gave the slightest notice of an intent to certificate to Piedmont any routes outside of those covered by its application.

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*There was no similar regulation in 1945 as the Administrative Procedure Act pursuant to which this regulation was made was not enacted until 1946 (60 Stat. 237).

(d) Reply to paragraphs numbered 7 and 8.

The matter quoted in paragraph numbered 7 from the conference report supports State's argument that in consolidated proceedings the Board, prior to the present case, has dealt only with specific applications. Here the examiners plainly stated that they were dealing not with any general geographic problem but with "the applications included in the consolidated order" which "involve service to the states" then listed.

We have dealt heretofore with the matter quoted in paragraph numbered 8 (State Br., pp. 56-7; State Rep. Br., p. 22). Not only does the examiners' language (R. 671) show that they would not recommend for any applicant entirely different routes from those covered by the application, but the examiners' language dealing with amendments (R. 671), to which the Board does not call the Court's attention, shows that each applicant was to be limited to the routes covered by its application. If, as the Board now contends, once any applicant is in a consolidated proceeding it is entitled to any routes in the "area", why did the examiners require (R. 671)

> "* * * all amendments to applications consolidated in this proceeding must be filed within ten days * * *"?

On the Board's theory this would have been a useless formality for all were in any event candidates for the entire area involved.

(e) Reply to paragraphs numbered 9, 10 and 11.

Again the facts here stated, while true, have no relevancy. It is not contended, and cannot be, that the orders or notices referred to contained any intimation that the Board would disregard the statute and certificate Piedmont for routes not covered by its application at all.

(f) Reply to paragraph numbered 12.

The Board here seeks largely to reargue matters already covered by its Brief (pp. 31-42). A complete answer to these contentions appears in State's Reply Brief, pp. 19-26.

(g) Reply to paragraph numbered 13.

This is the Board's own self-serving justification of its action in certifying Piedmont. It portrays the culmination of years of callous indifference to State's rights—an attitude which prompted State to request, both here and in the court below, a mandatory order compelling the Board to accept in its dealings with State the fundamental standards of fair play. Thus, the Board states (R. 618):

> "The mere fact that State, intent on matters which it deemed more important, did not consider Piedmont as a threat to it, cannot be used to support a plea that it was deprived of notice and hearing."

State did not consider Piedmont "a threat" because Piedmont had not applied for State's routes. Piedmont was not a competing applicant for the transportation sought by State. State introduced no evidence of Piedmont's many shortcomings (see, *e.g.*, R. 629 [78-81]). It had no opportunity to do so. Piedmont's certification came as a complete surprise (*cf.* R. 681).

Contrary to the Board's statement, "The procedure in this case" was not "the same as that followed by the Board both prior to and since this case in * * * local feeder area proceedings". The cases which the Board cites do not support its statement (see State's Rep. Br., pp. 9-12, 21). The Board, in a uniform line of decisions in "consolidated" cases, has repeatedly held that it will not certify an applicant for routes not covered

by its application (State Br., pp. 54-5, 59-60, 65-7, 71-3). Among other reasons for such decisions the Board has specifically assigned the "denial of due process" if certification is to cover points other than those specified in the application (State Br., pp. 66-7).

December 19, 1949.

Respectfully submitted,

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